ESSAY

BANKRUPTCY LAW, RITUAL, AND PERFORMANCE

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Drawing on recent work in performance and cultural studies, as well as from seminal works in anthropology and sociology, Professor Korobkin argues that bankruptcy law is "performative" in an important sense: It is a ritualistic process that embodies a mode of meaning by which our culture responds to irreparable loss and impasse. Diverging from recent efforts to understand law in performative terms, which have focused mainly on the law's role in constituting personal and social identities, the Essay adopts a new theoretical approach. It argues that the very structure of law—namely, the relationship of rights to remedies as manifested in bankruptcy law—is itself performative.

Professor Korobkin focuses on the practical and normative impasse that the law confronts when debtors cannot pay their lawful debts. The Essay traces the law's response to this predicament: from the early practices of debtor torture and imprisonment, to the rise of the bankruptcy discharge in nineteenth-century America, and finally to the protections afforded to mostly middle-class debtors under current bankruptcy law. It shows how collection law copes with this impasse by offering a performance that "stands in for" the fulfillment of the debtor's original commitments. Considered in this light, current bankruptcy law embodies a performance that releases debtors from their obligations, ritualistically displaying continuing respect for those very rights and expectations that bankruptcy law systematically subverts. The modern debtor—undergoing bankruptcy law's "rite of passage"—becomes a performative medium through which the law affirms middle-class ideology in the face of its challenges.

INTRODUCTION

Lifestyle plays an essential role in recent accounts of modernity.[1] Anthony Giddens, for example, describes the modern subject as engaged in "the reflexive project of the self"—the self created and constantly re-

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1. See, e.g., David Chaney, Lifestyles 13 (1996) (characterizing lifestyle as a "distinctly modern form" of social grouping); Don Slater, Consumer Culture & Modernity 83–88 (1997) (summarizing recent work that connects lifestyle with identity crisis in the post-traditional world).

created by a person's ceaseless revisions to an autobiographical narrative.[2] A person marks revisions to this work in progress through her varied choices, including decisions about where to live and work, whom to befriend, and what to buy. Through this process of self-monitored choice and ordering, individuals adopt routines and thereby choose lifestyles.

This view of lifestyle tends to emphasize its fluid nature: Because self-identity is in flux, lifestyle also must be in flux. Moreover, it relies on a concept of choice that minimizes the practical difficulties involved in reversing choices. This concept of choice accurately models some categories of everyday decisions. Without serious consequence, people constantly change their minds, schedules, and plans. Other kinds of choices, however, involve commitments—personal, social, or legal—and their reversal comes only at a cost.

The practical costs of reversing commitments may explain, in part, why lifestyles in practice do not seem as fluid as they do in theory. For the American middle class especially, the routines of lifestyle appear to have considerable staying power. People get married and raise kids; they work hard to buy homes, cars, and consumer goods. Perhaps more tellingly, once on the track of the American dream, they often stay on track. They complete their home payments, send their kids to college, and ultimately retire. Indeed, they struggle mightily to stay on this road, often against the odds of divorce, medical catastrophe, job loss, or other disruption.[3]

In these practical terms, a person affords a lifestyle—with cash or credit. The lifestyles that characterize the middle class depend crucially on credit, from mortgages to car loans to credit card debt. The institution of credit permits a person to choose a lifestyle even if she cannot immediately afford it. While permitting immediate gratification, the credit lifestyle also requires long-term sacrifice. In exchange for enjoying goods in the present, the consumer submits herself to the discipline of regular installment payments.[4] At the same time, she must surrender to the discipline of the work life necessary to pay those obligations in a timely fashion. As a result, the credit relationship determines important aspects of the consumer's lifestyle, compelling a person to structure her time and activities toward the ultimate end of meeting her contractual commitments.

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2. Anthony Giddens, Modernity and Self-Identity: Self and Society in the Late Modern Age 9 (1991).

3. For accounts of middle-class struggle to retain socioeconomic status, see Katherine S. Newman, Falling from Grace: The Experience of Downward Mobility in the American Middle Class 7–18 (1988); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt 14–22 (2000) [hereinafter Sullivan et al., Middle Class].

4. See Lendol Calder, Financing the American Dream: A Cultural History of Consumer Credit 30–31 (1999) (describing consumer credit as an instrument of control, which involves "an actual enforcement of economic imperatives in the lives of consumer debtors").

Ironically, many of the very choices by which a person constructs a lifestyle place at risk the continuation of that lifestyle: People sometimes default on their commitments. Certain defaults are benign. The amount of the obligation may not be large, or the creditor may not be aggressive in his collection efforts. Sometimes, however, the debtor's ability to adjust to the creditor's demands is limited, and the default engenders a crisis. The default may endanger the debtor's continuing ownership of property that is essential to the lifestyle—such as a person's home—or the default may be part of a combination of defaults that threatens the debtor's lifestyle in general. In either case, the debtor (and the debtor's household) is in financial distress.[5]

This variety of financial distress is overwhelmingly a middle-class experience.[6] It generally presupposes that the debtor is—or recently was—in an economic position to incur substantial credit obligations, and thereby to develop patterns of consumption that are generally associated with middle-class lifestyles. Indeed, among the approximately one million individual bankruptcy petitions filed annually, one-half of debtors are homeowners,[7] and the vast majority of debtors have educational attainments and occupations typical of the middle class.[8]

The existence of financial distress among the American middle class creates a dilemma for policymakers. On the one hand, powerful social and legal norms and purposes dictate that people should keep their commitments, and must face appropriate sanctions if they do not. Capitalistic ideology pictures economic life as a competition with a level playing field: There are winners and losers, and individuals rise or fall based on their own efforts. What one earns one keeps, and thus contractual and property interests are sacred. Against this backdrop, it would be difficult to accept any governmental program that changes the rules in the middle of the game—releasing debtors from their promises, depriving creditors of their hard-earned bargains, and rewarding the "losers."

On the other hand, it would be equally unacceptable in a capitalist society for middle-class people systematically to lose their status and lifestyles. The economic hardship that would result from the deterioration of the middle class is only part of the concern. The threat is also ideological. The widespread failure of the middle class would undermine the capitalist creed that economic progress is inevitable: that hard-working people inevitably succeed, and that the American middle class is hard-working. Furthermore, political discourse connects national identity with lifestyle. It thus would be an attack on "us" as a nation if large segments

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5. For a fuller discussion of financial distress as a crisis created by the debtor's inability to adjust to incommensurable demands, see Donald R. Korobkin, Rehabilitating Values: A Jurisprudence of Bankruptcy, 91 Colum. L. Rev. 717, 763–66 (1991).

6. See Sullivan et al., Middle Class, supra note 3, at 6 (describing results of empirical studies that show that "bankruptcy is a largely middle-class phenomenon").

7. See id. at 202.

8. See id. at 73.

of the middle class were to lose their homes, their cars, the means to send their kids to college, and their ability to live according to a certain standard of affluence. Such a catastrophic event would also threaten the stability of the credit economy, on which capitalism so critically depends.

In addressing the problem of middle-class financial distress, then, policymakers face competing and seemingly contradictory normative dictates. The individual bankruptcy system represents and embodies the law's struggle to manage this tension. The bankruptcy process protects the stability of the middle class by releasing financially distressed persons from their payment obligations, but at the same time seeks to preserve norms associated with promise keeping and the preservation of vested property interests.

This Essay argues that bankruptcy law's struggle to accommodate these ultimately incompatible aims is (and must be) "performative" in an important sense. While legal scholars have spent decades examining the senses in which law draws upon and resembles narrative,[9] they have only recently given sustained attention to the idea of law as performance.[10] Much of this recent work takes one of two approaches. One approach applies a literal concept of performance as "having the attributes of the performing arts" and focuses on how legal institutions and processes resemble these cultural artifacts.[11] In contrast, a second approach views performance not as an artifact but as a mode of embodied meaning—a kind of rehearsal of self, a citation of behavior or norms by which persons come to be known.[12] Legal scholars following this second approach gen-

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9. For a comprehensive overview of this work, see generally Guyora Binder & Robert Weisberg, Literary Criticisms of Law (2000) (exploring literary criticism's usefulness in understanding and assessing law).

10. See, e.g., Ariela Gross, Beyond Black and White: Cultural Approaches to Race and Slavery, 101 Colum. L. Rev. 640, 651–54 (2001) (describing recent work that views trials as either a form of performance or as the performative source of racial identity).

11. The comparison of legal processes to the performing arts—in particular, the characterization of a judicial proceeding as a form of theater—has a long history. See, e.g., Thurman W. Arnold, The Folklore of Capitalism 230–40 (1937) (describing corporate reorganization proceeding variously as a "drama," "ceremony," and "a Chinese play, in that it was endless, and very highly stylized"). Recent work, however, has expanded and developed this comparison, and has used the metaphor of law as a performing art to discuss the law's structure and theories of legal interpretation. See, e.g., Milner S. Ball, The Promise of American Law: A Theological, Humanistic View of Legal Process 42–63 (1981) (analyzing courtroom trials as a form of "judicial theater," complete with "stage," audience, and dramatic format); J.M. Balkin & Sanford Levinson, Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews," 20 Cardozo L. Rev. 1513, 1520–21, 1530–37 (1999) (analogizing difficulties faced by judges in interpreting and enforcing unjust laws to problems involved in the performance of offensive musical tex → Pierre Schlag, Normativity and the Politics of Form, 139 U. Pa. L. Rev. 801, 807, 884–85 (1991) (analogizing legal thinkers to performers following a "rhetorical script of normative legal thought" and involved in the "theater of the rational").

12. Legal scholarship along these lines draws its immediate inspiration from Judith Butler's work on the performativity of gender roles. See generally Judith Butler, Gender

erally use this concept of performance to explore not the performativity of legal institutions or processes in themselves, but of personal and social identities as regulated and (partly) constituted by law.[13]

This Essay pursues yet a third approach to understanding law as performance. Unlike the first approach (and like the second), it employs a concept of performance as a mode of meaning—one that brings together ideas drawn from performance and cultural studies, anthropology, and sociology.[14] Like the first approach (and unlike the second), however,

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Trouble: Feminism and the Subversion of Identity (10th anniv. ed. 1990). Butler posits that "gender reality is created through sustained social performances," produced in and through "stylized repetition of acts." Id. at 179–80. Her concept of performativity—and much of the burgeoning scholarship in performance and cultural studies—traces its intellectual beginnings to philosopher J.L. Austin's work on "performative utterances" during the 1950s. See generally J.L. Austin, How to Do Things with Words (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (originally delivered in 1955 as the Henry James Lectures at Harvard). According to Austin, certain (legal and nonlegal) utterances are performative in that they do not merely describe a state of affairs, but effectively bring about a state of affairs. See id. at 12–13 (discussing the performative effect of the marriage ceremony's utterance "I do"). Cultural critics have used this concept of performativity to explore the law's contribution to the creation of identities. See, e.g., Andrew Parker & Eve Kosofsky Sedgwick, Introduction: Performativity and Performance, *in* Performativity and Performance 1, 5–8 (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995) (discussing the link between Austin's concept of performative utterances and the Pentagon's "don't ask, don't tell" policy on homosexuals in the military).

13. See, e.g., Ariela R. Dubler, Wifely Behavior: A Legal History of Acting Married, 100 Colum. L. Rev. 957, 1007–10 (2000) (describing the potentially subversive implications of past legal doctrine that recognized the existence of common law marriage based on the performance of socially scripted behavior); Martha M. Ertman, Reconstructing Marriage: An InterSEXional Approach, 75 Denv. U. L. Rev. 1215, 1234–40 (1998) (arguing in favor of commercialization of marriage through premarital security agreements based on the claim that such reform would "undermine the naturalized status of marriage by revealing the performative nature of both gender and of heterosexuality"); Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 Yale L.J. 109, 156–76 (1998) (depicting trials in the antebellum South as an arena for the "performance of whiteness" and the construction of racial identity). This approach to performativity is part of the broader category of cultural criticism of law that, in the words of Binder & Weisberg, "[v]iews law as an arena for the performance and contestation of representations of self and as an influence on the roles and identities available to groups and individuals in portraying themselves." Binder & Weisberg, supra note 9, at 463. For a survey of recent work of this type, see id. at 462–539. In an earlier article tracing the history of bankruptcy preference law, Weisberg examines the construction of the merchant character, and discusses how bankruptcy law's history reveals an ongoing debate about the "moral worth of a credit economy as well as more fundamental questions about reality and illusion in which money and credit become epistemological symbols." See Robert Weisberg, Commercial Morality, the Merchant Character, and the History of Voidable Preference, 39 Stan. L. Rev. 3, 13–21, 59 (1986).

14. For useful overviews of interdisciplinary work in the area of performance, see Catherine Bell, Ritual: Perspectives and Dimensions 72–76 (1997) (describing "performance approaches" to ritual); Marvin Carlson, Performance: A Critical Introduction 13–75 (1996) (surveying anthropological, ethnographic, sociological, psychological, and linguistic approaches to performance); Jon McKenzie, Perform or Else: From Discipline to Performance 29–48 (2001) (examining the interdisciplinary origins and development of the performance "paradigm"); John J. MacAloon, Introduction:

this Essay is primarily interested in understanding the performativity of legal institutions and processes in themselves—of collection law and, more specifically, bankruptcy law and process. In essence, this Essay argues that law itself is performative, in that it arises from and embodies a performative mode of meaning.

As developed in this Essay, this performative mode of meaning involves a response to irreparable loss, what literary critic Joseph Roach has described as "surrogation."[15] Roach's work focuses on the processes by which circum-Atlantic culture has reproduced and recreated itself. Faced with "cavities created by loss through death or other forms of departure," a culture survives by the work of collective memory—the search for a replacement or surrogate that will stand in for the original.[16] This ongoing process of surrogation involves "the doomed search for originals by continuously auditioning stand-ins."[17] According to Roach, surrogation "rarely if ever succeeds," for "[t]he intended substitute either cannot fulfill expectations, creating a deficit, or actually exceeds them, creating a surplus."[18] From this perspective, then, performativity represents a coping with loss, a means of cultural survival under constraint.

This mode of meaning is organic to law, for the structure of legal rights and remedies makes loss unavoidable. By recognizing rights, liberties, and property interests and establishing zones of protection from civil and criminal injury, the law defines and marks occasions of possible (and inevitable) loss—possessions that must be recovered, injuries that must be righted, boundaries that must be repaired. Ultimately, however, these losses are irreparable; the law cannot literally undo what has been done, but can only provide "compensation"—making up for a deficit in one context by reward in another, providing at best an "equivalent" but never the very thing lost. Ironically, law creates the conditions for its own struggle—creating the rights without which there would be no search for a remedy. In its search for a remedy, the legal process then must engage in

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Cultural Performances, Cultural Theory, *in* Rite, Drama, Festival, Spectacle 1, 3–13 (John J. MacAloon ed., 1984) (describing intellectual origins of the contemporary study of cultural performances).

15. See Joseph Roach, Cities of the Dead: Circum-Atlantic Performance 2 *passim* (Soc. Found. of Aesthetic Forms Series, 1996) [hereinafter Roach, Cities]. Roach's concept of performance as "surrogation" derives in part from Richard Schechner's ground-breaking work on the nature of performance in theater and culture. See Joseph Roach, Kinship, Intelligence, and Memory as Improvisation, *in* Performance and Cultural Politics 218 (Elin Diamond ed., 1996) (adopting Schechner's definition of performance in earlier version of chapter from *Cities of the Dead*). Schechner defines performance as "restored behavior" and, like Roach, focuses on how this mode of meaning "offers to both individuals and groups the chance to rebecome what they once were—or even, and most often, to rebecome what they never were but wish to have been or wish to become." See Richard Schechner, Between Theater & Anthropology 35, 38 (1985).

16. Roach, Cities, supra note 15, at 2.

17. Id. at 3.

18. Id. at 2.

the ultimately doomed work of surrogation, perpetually seeking to recover an original that is forever lost.

The law of remedies, then, is an institutionalized form of coping with irreparable loss, a way of moving through and beyond impasse to some temporary and imperfect resolution. As a preliminary example, consider the problem of compensation in civil actions. When a person suffers a legally cognizable injury at the hands of another, she may bring a civil lawsuit against the perpetrator. While the civil process exists partly to reimburse the injured party for her monetary losses, it also seeks to compensate her in a more profound sense—to "make her whole." In its actualization, however, this normatively required action is futile, for it is impossible to compensate a person fully and truly for her suffering. Law offers a performative solution to this practical impasse. The practice of awarding monetary damages for pain, suffering, and similar harms is a kind of rite of memory for what has been permanently lost. In this context, legal process functions as a remembering—coping with loss by authorizing a replacement that ritualistically stands in for a departed original.

This Essay examines a related question of compensation and performativity: How does the law respond to the loss and impasse that result when a debtor cannot (or will not) fulfill a legal obligation of payment? By theorizing collection law as performance, this Essay offers a new perspective in the continuing debates about the larger purposes of modern bankruptcy law. Previous theoretical accounts of individual bankruptcy law have explained the operation and purposes of specific provisions or policies—in particular, the bankruptcy discharge.[19] While this Essay offers its own reading of the significance of the bankruptcy discharge, it ultimately has a wider theoretical focus: to explain the existence and metaphoric structure of the individual bankruptcy system—and ultimately collection law—as a whole. Bankruptcy law's performance, this Essay suggests, does not logically flow from the preset operation of isolated policies or norms. Rather, it spontaneously emerges, at a juncture of futility and loss, from the dynamic and generative tension of normative directives in unavoidable conflict.

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19. See, e.g., Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System 96–103 (1997) (arguing that the forgiveness mandated by bankruptcy law's fresh start policy has psychological, humanitarian, and economic benefits); Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 227–43 (1986) (indicating that the fresh start policy is "substantively unrelated" to creditor-related bankruptcy policies and justifying the bankruptcy discharge as a corrective to cognitive and volitional "defects" in individual decisionmaking); John M. Czarnetzky, The Individual and Failure: A Theory of the Bankruptcy Discharge, 32 Ariz. St. L.J. 393, 398–400 (2000) (presenting the "entrepreneurial hypothesis" that explains the bankruptcy discharge as a means of fostering individual entrepreneurship); Richard E. Flint, Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor, 48 Wash. & Lee L. Rev. 515, 531–35 (1991) (offering a "moral justification" of the bankruptcy discharge based on natural law theory).

The Essay has four Parts. Part I locates collection law in the context of law generally, and explores some of the metaphoric implications of defaulting on contractual commitments. Part II then traces the historical evolution of collection law's performative response to financial distress, from the early practices of debtor servitude, torture and the debtors' prison, to the emergence of the bankruptcy discharge. Part III focuses on modern bankruptcy law. Drawing from writings in the areas of ritual and everyday performance, it shows how bankruptcy law emerges from the struggle to move beyond practical and normative impasse—undoing legal commitments, but in essentially ritualistic ways that display appropriate regard for norms associated with keeping promises and preserving vested property interests. Finally, Part IV considers certain political and ideological implications of bankruptcy law's performance. Insulating mostly middle-class debtors from the experience of long-term poverty, the bankruptcy process protects the political power of the middle class, and offers a redemptive possibility that works to vindicate middle-class ideology in the face of its challenges.

I. The Distinction Between Substantive Law and Collection Law

The legal rules pertaining to the credit relationship rest on a conceptual distinction between substantive law and collection law. As used in this context, substantive law includes rules that establish basic contract or property rights, and that proscribe various kinds of injury against person and property. In addition, it includes rules that authorize parties to seek legal redress if any of their rights are violated.[20] For example, contract law provides that one party may have a right to recover damages when the other party breaches an enforceable contract. Substantive law focuses on whether a party has a right; it generally has little to say about how a person with such a right actually gets paid.

In contrast, collection law consists of the rules by which a party whose rights have been violated may obtain monetary compensation against a defaulting party. Debt collection may occur under one of two systems—nonbankruptcy (mostly state) collection law or federal bankruptcy law. Each system of law includes steps by which a creditor may compel a debtor to pay an existing obligation, and also contains rules that protect the debtor and his dependents from suffering undue harms in the collection process.

The distinction between substantive and collection law is embedded in the legal process. Assume that a debtor has defaulted on a $10,000 obligation to Citibank. The merits of the case will be decided by refer-

20. This concept of substantive law thus includes, in the terms of John Austin, both "primary rights" and "sanctioning or secondary" rights. 2 John Austin, Lectures on Jurisprudence 787–92 (Robert Campbell ed., 4th ed. 1873) (distinguishing between primary rights and sanctioning rights, where sanctioning rights involve the right to redress the violation of a primary right).

ence to the substantive law governing contracts. If the creditor prevails, the court will issue a judgment, essentially an order that authorizes the creditor to collect $10,000 (perhaps with interest) from the debtor. Significantly, the judgment does not order or otherwise compel the debtor to pay any money. In order to obtain satisfaction of its judgment, the creditor must take other, separate steps: The creditor must use collection law.

In seeking collection of a defaulted obligation—whether under nonbankruptcy collection law or federal bankruptcy law—the creditor (and debtor) must enter another sphere. A credit contract represents a conceptual whole, consisting of a legal commitment and the anticipated fulfillment of the commitment. It is a sphere of largely determinate possibilities and linear time, where the future follows in segments from the past. A contract may describe the creditor's remedies in the event of the debtor's default. Within the sphere of the contractual doing, however, the possibility of the debtor's default is a formal contingency, not a rupture. The contract rewrites the possibility of default as a function of the initial bargain: The risks are allocated.

While the theoretical possibility of default is written into the contract, the reality of default remains a moment of transgression—a breach of trust that moves the parties into a different sphere. Even when a contract specifies particular remedies, the creditor still must face the practical challenges and potential difficulties of realizing the remedy. Debtors flee; assets disappear. The creditor's success ultimately depends on circumstances and variables beyond the contractual sphere. The actual pursuit and possible realization of a remedy is "off schedule." It occurs outside the quantitative time of the contractual clock, and within the experiential time of the actual moment, which replaces segments of time with the irregular rhythms of practical decisionmaking. In this way, actual default ruptures the utopian world of contractual time, and deposits the parties into a fallen world of indeterminate and largely improvisational tempo.

This fallen world is one of punishment, pain, and the search for redemption, where debtors must face the consequences of their actions. Under early forms of collection law, defaulting debtors were killed, maimed, or subjected to hard labor at the mercy of their creditors.[21] While a more humane law of debt collection has long since replaced these brutalities, modern collection law and practices contain traces of an earlier day, including routine creditor harassment, state-sanctioned dispossessions, and imprisonment for certain kinds of default.[22]

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21. See, e.g., 2 William Blackstone, Commentaries *472 (noting the early practices of carving up the debtor's body in satisfaction of multiple debts and of subjecting the debtor to hard labor).

22. Even to this day, most jurisdictions authorize imprisonment as a means of enforcing child support obligations. See Sullivan et al., Middle Class, supra note 3, at 191.

More fundamentally, from the beginnings of collection law to the present, the binary relationship between contractual theory and the reality of default has remained in place. It is a relationship between order and chaos, between abstract reason and the unruly body. Substantive law governs the realm of reason, defining the pure relations between individuals, while collection law must govern the satanic realm, the realm of desires, of fleeing debtors and the eternal grasping after ever-elusive assets.

Most obligations are paid voluntarily and on time. Fundamental to contractual theory is the idea that legal persons continue in time, that the person who promises is the same person as the one who pays. By paying an obligation in a timely fashion, a debtor submits to being a legal continuation of the person who promises. Debtors fulfill their contractual commitments in order to remain in a world where obligations are clear and meanings certain, but at the cost of being constituted and reconstituted as the person responsible for the promise.

The debtor who defaults implicitly resists the idea that he is legally responsible for the actions of the person who promises. Collection law must somehow overcome this resistance—whether by violence, threat of violence, or promise of benefit—and in a way that demonstrates that resistance is useless.

II. Performativity and the History of Collection Law

Collection law—both early and modern—has a primary goal: to provide an aggrieved creditor with the practical equivalent to what he would have received if the debtor had voluntarily fulfilled his commitments. For many centuries (and to the present day), the unpaid creditor has had the right to enforce his remedy against the defaulting debtor's personal property and lands.[23] Obviously, this collection method is effective only when the debtor owns property that can be easily seized. When such property is not available, the law is forced to adopt other strategies for giving equivalence to the creditor.

A. *Early Collection Law*

Under the early law of the Judeo-Christian tradition, a common remedy for default was involuntary servitude of the debtor for a period sufficient to pay off the obligation.[24] This scheme of collection is based on a

23. See Hugh Barty-King, The Worst Poverty: A History of Debts and Debtors 3–4 (1991) (detailing the legal procedure in thirteenth-century England by which a creditor satisfied an obligation against the debtor's property).

24. See id. at 3; I.A.H. Combes, The Metaphor of Slavery in the Writings of the Early Church 26 (Stanley E. Porter ed., 1998) (commenting on the common practice of debt bondage in the ancient Near East). Unfortunately, this mode of collection is not restricted to ancient times. For example, it appears (in an altered form) in nineteenth-century America as part of pernicious systems of peonage by which plantation owners, railroad owners, and other employers coerced dependent and vulnerable persons to engage in

particularly compelling notion of commitment under the law. By virtue of making a legally enforceable commitment, the debtor as a person stands behind the performance of the promise. By then defaulting on his commitment, the debtor effectively forfeits his person to the creditor for purposes of satisfying the obligation. The debtor's person is then capturable in and through the debtor's body, both its present substantiality and its potential for productive labor. In addition, the debtor's compelled labor seems to give the creditor an equivalent to the outcome that he would have obtained if the debtor had performed the contract as promised—the economic value of the creditor's bargain.

The search for an equivalent to contractual performance appears in another early collection scheme. Under the Roman law of the Twelve Tables, if a debtor did not or could not pay the debt, and no one came to the debtor's financial assistance, the creditor inflicted physical harm on the debtor.[25] This practice follows from a similar idea of commitment under the law—the defaulting debtor forfeits his body to the creditor. Nietzsche famously described the cruelty sanctioned by this early collection law as giving birth to the very capacity to promise;[26] in this account, Nietzsche noted the "logic" underlying the practice.[27] Confronted with a debtor who cannot pay, the creditor cannot get "an advantage that directly makes good for the injury," such as "money, land, possession of any kind."[28] In its place, the creditor is legally authorized to maim the debtor, and is thereby "granted a certain feeling of satisfaction as repayment and compensation[ ]—the feeling of satisfaction that comes from being permitted to vent his power without a second thought on one who is powerless."[29] Rather than getting what is promised, the creditor obtains "the enjoyment of doing violence."[30] This logic of compensation extends from the fact of cruelty to the regulation of its precise extent: The amount of the debt determined the kind of injury that the creditor was authorized to inflict.[31] Being robbed of one thing of value, the creditor receives something that is supposedly of equal value to him.

From the perspective of the social order, however, the logic is somewhat different. Clearly the cruelty of the creditor exhibits the logic of act and consequence. The creditor's cruelty punishes the debtor for his wrongdoing, and perhaps deters others from reckless promising. Yet the logic of act and consequence is not the only type of logic exhibited here. The ultimate point of the proceeding is not punishment, but "compensa-

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what was essentially slave labor. See Aziz Z. Huq, Peonage and Contractual Liberty, 101 Colum. L. Rev. 351, 361, 379–81 (2001).

25. See Blackstone, supra note 21, at *472.

26. See Friedrich Nietzsche, On the Genealogy of Morality 40 (Maudemarie Clark & Alan J. Swensen trans., 1998).

27. See id. at 40.

28. Id. at 41.

29. Id. (original emphasis omitted).

30. Id.

31. Id. at 40.

tion." The compensation comes in the form of a doing—the aggrieved party inflicting harm "without a second thought on one who is powerless."[32] In this doing, the creditor on behalf of the society enacts a kind of remembering, marking the transgression by the maiming of the debtor's physical body. The creditor also enacts a kind of forgetting: This doing is not the original thing promised. Unlike the practice of involuntary servitude, the violence directly inflicted on the debtor's body does not result in an outcome that is an economic equivalent to what was promised. In the absence of the original thing promised, the creditor's action must count as the doing of what was promised.

The logic here is performative. The creditor's enjoyment of doing violence "stands in for an elusive entity that it is not but that it must vainly aspire both to embody and to replace."[33] That "elusive entity"—the keeping of the original commitment—can never be recovered. The "satisfaction" of the debt by maiming works by a magical logic: The dismemberment of the debtor's body must stand in for dismemberment of the debtor's assets. The gesture is ultimately one that arises from a sense of futility and exhaustion of agency. At the same time, insofar as it represents a mode of giving compensation, the gesture denies its own futility, and promises a return to a utopian world in which order has been restored, with each person having received his due.

For the creditor who did not accept the equivalence of debt and cruelty, however, this mode of collection did not give real compensation. Over the years, debt collection adopted a different means of responding to default: the debtors' prison. Under the law of the debtors' prison as it existed in England beginning in the thirteenth century, the debtor could be imprisoned for failure to pay a lawful debt.[34] The debtor would remain in prison until the default was somehow cured.

Imprisoning the debtor—like involuntary servitude—was not penal in nature; it was an effort to secure the economic equivalent of the original commitment.[35] As applied to ordinary debtors, imprisonment was viewed as a means by which a creditor might coerce payment, whether by the debtor himself, or by the debtor's friends and relatives. As a practical matter, this coercion worked by threatening the debtor's future—his life, livelihood, and freedom. The creditor who caused the debtor's imprisonment essentially held the debtor's body as "security" for the repayment of the debt.

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32. Id. at 41.

33. Roach, Cities, supra note 15, at 3.

34. Barty-King, supra note 23, at 12–15 (sketching the history of the debtors' prison in England); Peter J. Coleman, Debtors and Creditors in America 4–5 (1974) (describing procedures under English law for imprisoning debtors).

35. See Jay Cohen, The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy, 3 J. Legal Hist. 153, 155 (1982) (indicating that the point of the debtor's imprisonment was not punishment, but coercing the debtor to pay the debt).

The debtors' prison thus represents a collection device that is analogous to what modern commercial law refers to as a "security interest."[36] Under Article 9 of the Uniform Commercial Code, the creditor and debtor may reach an agreement by which the debtor grants to the creditor a security interest in specific and designated property of the debtor.[37] The security interest in this property (called "collateral") secures payment of the debtor's obligation. A common example of a security interest in personal property is a car loan, in which the dealer or financing corporation takes a security interest in a car to secure payment of its purchase price. In the event of the debtor's default, the secured creditor has a special kind of remedy: The creditor may repossess the collateral to satisfy the obligation.[38] The secured creditor may then hold a private or a public sale of the collateral to satisfy the obligation[39] or, in some cases, merely keep the property itself in satisfaction of the obligation.[40]

The debtors' prison—while quite different from a modern security device—works in a similar way: The creditor holds the debtor's body as "collateral" for the repayment of debt. This conceptualization of the debtors' prison as a security device connects the practices of imprisoning debtors with earlier collection methods of involuntary servitude and dismemberment. Under each of these collection methods, the debtor's commitment places the debtor's body directly at risk. This threat flows logically from conceiving of the body as collateral for a debt: If the debtor defaults, the creditor may liquidate the collateral in satisfaction of the debt. As a conceptual matter, the underlying threat remains satisfaction of the obligation by means of "liquidation" of the debtor's body—in the case of the earlier devices, by slave labor or dismemberment.

The debtors' prison, however, differs from the earlier collection devices in an important respect. Under the law of involuntary servitude or physical punishment, the threat is actually carried out: The "collateral" is liquidated. In contrast, under the law of the debtors' prison, the debtor's body is never liquidated. Paradoxically, the debtors' prison creates a "security interest" that can never be enforced—a remedy that is no remedy, a threat that it must perpetually defer.

As a matter of historical fact, debtors often languished in jail until someone came forward to pay the debtor's obligations, the creditor desisted,[41] or the debtor died. The languishing of the debtor defines a

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36. U.C.C. art. 9 (2003).

37. See id. § 9-203(b) (providing for enforceability of security interests).

38. See id. § 9-609(a), (b) (authorizing secured party to take possession of collateral after default).

39. See id. § 9-610 (regulating the debtor's disposition of collateral following default).

40. See id. § 9-620(a) (establishing conditions under which secured party may retain collateral in satisfaction of the debt).

41. Under certain versions of the law, the creditor had an added reason to desist, because he was responsible for paying the debtor's upkeep while in prison. See Coleman, supra note 34, at 251 (indicating that, under Massachusetts and Connecticut colonial law, creditors were required to pay debtors' jail fees); Cohen, supra note 35, at 154, 158

point of impasse, in which obtaining economic equivalence has proven impossible. The response to this impasse is performative. Under the earlier collection law—a world of violence carried out—the creditor's "enjoyment of doing violence" stands in for the payment of the original obligation. In the world of the debtors' prison—of violence deferred—the suffering of the debtor becomes the surrogate for performance of the original commitment. Moving the effort to collect debt through and beyond impasse, the deferral of violence opens up and defines a space of time in which the debtor suffers—and through the passage of which the meaning of this suffering may emerge.

The meaning of the debtor's suffering is largely moral. While the original point of imprisonment was coercion not punishment, the debtor's continued confinement without rescue, sometimes over months or years, tended to constitute the debtor as someone deserving of punishment. The debtor's state of perpetual limbo becomes a revelation: "[I]f others will give [the debtor] nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill-behavior brought him to that imprisonment."[42] The debtor's continued presence in prison testifies to the moral flaws that made the debtor vulnerable to imprisonment in the first instance.

Even more profoundly, the debtor's continued imprisonment testifies to the state of the debtor's soul. The deferral of violence opens up a space so empty that only divine grace can fill it. In 1419, the Mayor of London issued an ordinance that described the true and proper role of the debtors' prison in the following terms:

> to provide a place where poor prisoners might . . . dwell in quiet and pray for their benefactors, and live on the alms of the people; and in increase of their merits, by benign sufferance, in such imprisonment pass all their lives if God should provide no other remedy for them.[43]

The description suggests a view of debtors as monks or martyrs rather than criminals. Rather than being a place in which the threat of physical violence is carried out, the debtors' prison is a place where debtors "pray for their benefactors" and "pass all their lives if God should provide no other remedy for them." The debtor's default replays the Original Sin, and the debtors' prison becomes a spiritual stage on which fallen Man waits in hope of redemption. The deferral of law's violence

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(describing, respectively, thirteenth- and seventeenth-century English acts under which a creditor could force the debtor's continued imprisonment by contributing to the debtor's subsistence while in prison).

42. Dive v. Manningham, 75 Eng. Rep. 96, 109 (K.B. 1551), quoted in 8 William Holdsworth, A History of English Law 233 n.1 (1926).

43. London, Eng., Ordinance (Nov. 2, 1419), quoted in Barty-King, supra note 23, at 12. The ordinance—which temporarily closed the debtors' prison at Ludgate—was issued in response to the perception that many debtors were using prison to evade paying their debts. See Barty-King, supra note 23, at 12.

thus creates an occasion for moral and spiritual inventory—and the possibility of grace.

The debtors' prison is obviously an inhumane means of coercing payment. In its metaphoric structure, however, the debtors' prison introduces the modern era of debt collection, for it displays the dual structure that becomes the basis of modern collection law. In the first instance, the legal order uses coercive means to obtain the economic equivalent to performance of the underlying commitment. In many cases, however, this effort reaches an impasse. This experience of futility is not an endpoint; instead, it becomes the occasion for an alternative mode of coping with the debtor's default. The deferral of violence opens up a space for meaning—the point of the debtor's imprisonment becomes defining the point of the imprisonment. Thus, the debtors' prison displays concurrently the search for literal equivalence and the emergence of a moral and spiritual inventory that comes to represent a surrogate for economic equivalence.

B. *Emergence of the Bankruptcy Discharge*

Over the centuries it became increasingly clear that holding the debtor's body in prison was an inadequate means of achieving the economic equivalent to contractual performance. For debtors with means to pay their obligations in the first instance, the threat of continued imprisonment might have compelled payment. For the vast majority of truly insolvent debtors, however, imprisonment only prevented the debtor from earning the income necessary to pay the overdue debt and to maintain his family's current expenses.[44] In this way, the debtor's imprisonment served to heighten the financial crisis faced by the debtor and his dependents.

Nevertheless, the legal institution of the debtors' prison survived for centuries.[45] The earliest bankruptcy laws did not replace the debtors' prison. The first English bankruptcy law, enacted in 1542,[46] was purely a collection device by which the state could seize the property of a delinquent debtor, sell it, and then distribute the proceeds among creditors on a pro rata basis.[47] Only "involuntary" bankruptcy was recognized:

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44. See Coleman, supra note 34, at 250, 255 (summarizing eighteenth-century criticisms of the debtors' prison); Cohen, supra note 35, at 157 (indicating that debtors' prison critics argued that imprisoning an insolvent debtor to compel him to pay debts was "paradoxical").

45. The debtors' prison was formally abolished in England in 1869, Cohen, supra note 35, at 164, and in the United States during the 1830s, Charles Jordan Tabb, The Historical Evolution of the Bankruptcy Discharge, 65 Am. Bankr. L.J. 325, 332 n.41 (1991).

46. An Act Against Such Persons as Do Make Bankrupts, 1542–1543, 34 & 35 Hen. 8, c. 4 (Eng.).

47. See Cohen, supra note 35, at 155–56 (describing Act's "original purpose" as simply facilitating transfer of debtor's assets to creditor → Louis Edward Levinthal, The Early History of English Bankruptcy, 67 U. Pa. L. Rev. 1, 14–15 (1919) (discussing how Act

The debtor could not file a petition for relief on his own behalf.[48] The pro rata distribution did not discharge the debtor's remaining obligations to creditors, and the law retained and incorporated the remedy of imprisonment.[49]

The first bankruptcy discharge appears in the Statute of 4 Anne, enacted in 1705.[50] Under this law, a debtor who complied with its provisions—who surrendered to examination under oath, fully disclosed his financial affairs, and surrendered all his assets—was granted forgiveness of his remaining debts.[51] Nonetheless, as part of the overall scheme of collection law, this early bankruptcy discharge did not repudiate the debtors' prison. Instead, it increased the rewards of cooperation without altering the consequences of noncompliance: The uncooperative debtor remained in prison. The development of the bankruptcy discharge thus served to bolster—not displace—the intended coercive effect of the debtors' prison.

In the next fifty years, the Statute of 4 Anne was followed by several enactments that, like the 1705 Act, discharged the cooperative debtor from his debts.[52] Significantly, the bankruptcy discharge contained in each of these early bankruptcy laws was not available to all persons—only those who qualified as "traders."[53] This limitation may have reflected in part the commercial reality that traders were more likely to incur large amounts of credit. More profoundly, however, it expressed a moral judgment that sought to distinguish between worthy and unworthy debtors. As Blackstone indicated in the middle of the eighteenth century, the laws of England:

> allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for

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empowered "certain high officials . . . to dispose of all the debtor's property" and pay off debts "in full, or, at least, rateably").

48. Tabb, supra note 45, at 330.

49. Cohen, supra note 35, at 155–56.

50. An Act to Prevent Frauds Frequently Committed by Bankrupts, 1705, 4 Ann., c. 17 (Eng.).

51. See Levinthal, supra note 47, at 18–20 (exploring details of discharge provisions for honest insolvents under the Statute of 4 Anne); Tabb, supra note 45, at 333–34 (same).

52. These laws included An Act to Explain and Amend an Act of the Last Session of Parliament, for Preventing Frauds Frequently Committed by Bankrupts, 1706, 5 Ann. c. 22 (Eng.), and An Act to Prevent the Committing of Frauds by Bankrupts, 1732, 5 Geo. 2, c. 30 (Eng.). See Tabb, supra note 45, at 339–44 (discussing developments in English bankruptcy law following the Statute of 4 Anne).

53. See Levinthal, supra note 47, at 18–20; Tabb, supra note 45, at 343.

> any person but a trader to encumber himself with debts of any considerable value.[54]

According to Blackstone, the nontrader commits a "species of dishonesty" merely by incurring debt, and thus such debtors must take the "consequences of their own indiscretion," including imprisonment.[55] The bankruptcy discharge thus works in tandem with the debtors' prison in accomplishing collection law's performative function. The denial of a discharge to "nondeserving" persons affirms and facilitates the moral and spiritual inventory of the nontrader debtor still languishing in prison.

The meaning of imprisonment began to shift in the middle part of the eighteenth century with the spread of commercial life and evolving views about the morality of debt. There were signs of change in the American colonies. Several of the colonies adopted rules that permitted debtors who surrendered their assets to obtain release from prison, and a few laws permitted discharge of debts through bankruptcy proceedings.[56] Nevertheless, throughout the period of the American Revolution, the debtors' prison remained an important feature of colonial justice.[57] The situation did not immediately change with American Independence. A short-lived Bankruptcy Act in 1800 closely followed English precedent—a bankruptcy process offering the possibility of discharge but limited to "merchants."[58]

The debtors' prison survived as long as the meaning of the prison—as a place for judgment and possible redemption—continued to offer the most compelling surrogate to contractual performance. Interestingly, the demise of the debtors' prison in the United States coincided with the antebellum debates, when the meaning of debt became intertwined with the politics of slavery.[59] In the eyes of legislators and lobbyists of the time, the debtors' prison embodied a form of slavery, one that enslaved

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54. Blackstone, supra note 21, at *473.

55. Id. at *473–*474.

56. See Coleman, supra note 34, at 10–11; Bruce H. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence 59–60 (2002) (discussing discharge statutes of the period in Massachusetts, New York, and Rhode Island).

57. See Mann, supra note 56, at 79 (noting that "every colony, and later every state, permitted imprisonment for debt").

58. Bankruptcy Act of 1800, ch. 19, § 1, 2 Stat. 20 (1800) (repealed 1803) (limiting eligibility to "any merchant, or other person . . . actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer").

59. See Edward J. Balleisen, Navigating Failure: Bankruptcy and Commercial Society in Antebellum America 165–67 (2001) (describing the rhetorical equation of slavery and insolvency by antebellum critics of insolvency laws); Scott A. Sandage, Deadbeats, Drunkards, and Dreamers: A Cultural History of Failure in America, 1819–1893, at 118 (1995) (unpublished Ph.D. dissertation, Rutgers University) (on file with the Rutgers University Library) (arguing that "the bankruptcy debate [in the decades immediately preceding and following the Civil War], at its political core, was a national discussion about the meaning of freedom in nineteenth-century America").

enterprising white men.[60] In an 1828 pamphlet attacking the debtors' prison, for example, the writer demanded that "this sort of *civil slavery*, be annulled, be annihilated and no longer be permitted to remain a foul blot upon the pages of our Code, no more tha[n] African slavery under the protection of the constitution of the general government."[61] Beginning in the 1820s, the use of the debtor's prison in the United States began to decline, with several states limiting imprisonment to instances of fraud.[62]

Yet even the abolishment of the debtors' prison would not free the downtrodden debtor from the "slavery" of debt. Antebellum proponents of bankruptcy legislation constantly equated the condition of indebtedness to chattel slavery—the debtor remaining in "perpetual bondage" to his creditors.[63] Indeed, common rhetoric of the time not only compared debtors to slaves, but also maintained that debt slavery was worse than chattel slavery.[64] "Other slaves have masters, charged with the duty of support and protection," Daniel Webster argued, "but [the bankrupts'] masters neither clothe, nor feed, nor shelter; they only bind."[65] As long as the insolvent debtor remained obligated to his creditors, his future belonged to another, and he remained "in chains."

The redemption of the white "slave" required far-reaching legislation, and the Bankruptcy Act of 1841 was revolutionary.[66] It abolished the "trader" requirement, offering discharge of prebankruptcy debts to anyone who complied with its provisions.[67] In the two years after its passage, over thirty thousand debtors filed for relief under the Act, and only 765 of these debtors were refused a discharge.[68] In response, creditors moved quickly to have the law repealed.[69] Although the law was repealed

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60. See Balleisen, supra note 59, at 167 (discussing links between insolvency, imprisonment, and slavery in antebellum debates); Sandage, supra note 59, at 123, 131–32, 201–02 (documenting the use of the slavery metaphor to describe the imprisoning of insolvent debtors in the decades preceding the Civil War).

61. The Patriot; or, People's Companion: Consisting of Five Essays on the Laws and Politics of Our Country . . . by One of the People 11 (1828), quoted in Sandage, supra note 59, at 131–32.

62. Balleisen, supra note 59, at 12.

63. The Expediency of a Uniform Bankrupt Law 13 (1840), quoted in Balleisen, supra note 59, at 166. See generally Sandage, supra note 59, at 115–217 (documenting pervasive use of slavery metaphor in bankruptcy debates from 1820 to 1867, and analyzing its significance). The rhetorical comparison of slavery to debt among American writers may be traced to the Revolutionary era. See Mann, supra note 56, at 130–46.

64. See Sandage, supra note 59, at 129, 190–93.

65. Daniel Webster, Uniform System of Bankruptcy, Address Before the United States Senate (May 18, 1840), *in* 2 The Papers of Daniel Webster: Speeches and Formal Writings 327 (Charles M. Wiltse & Alan R. Berolzheimer eds., 1988).

66. Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843).

67. Id. § 1, 5 Stat. at 441 (extending eligibility to "all persons whatsoever . . . owing debts").

68. See Charles Warren, Bankruptcy in United States History 81 (1935).

69. See Balleisen, supra note 59, at 119–20; id. at 82.

in 1843, its inclusion of a broad discharge represented a turning point in the jurisprudence of debt collection in the United States.

The political pressure for a new bankruptcy law again reached a critical point with the emancipation of African American slaves in 1861. The freeing of the slaves vindicated a concept of federal power that permitted the impairment of contractual and property rights in the service of overriding constitutional purposes—a concept essential to the enactment of a bankruptcy discharge.[70] At the same time, proponents of bankruptcy legislation insistently questioned how Congress could give freedom to blacks, while leaving white men in bondage.[71] Arguments in favor of bankruptcy legislation were frequently framed in terms of race. For example, one Congressman argued:

> This bill seems to be one of the very few designed for the benefit of white men during this Congress, and I see no good reason why the claims and interests of one hundred thousand white debtors, embracing many of our most valuable business men, should not receive the favorable consideration of this House.[72]

Meanwhile, a prominent lobbyist complained that "this administration refuse[s] to grant us that which they do not refuse to the meanest negro."[73]

The bankruptcy discharge thus emerges in the United States as a performance of male whiteness.[74] The debtors' prison disappeared as one performative response to the problem of default overtook another, as the political need to distinguish between traders and nontraders was overtaken by the need to distinguish between white male debtors and black slaves. The effort to compensate for a financial loss became intertwined with the struggle to compensate for other perceived losses—in social and economic status, as the white ruling class sought to manage slippages in its relative social status and power. In place of a system by which white males were customarily imprisoned, bankruptcy law provided a system under which they were customarily freed.

In 1867, Congress enacted a somewhat more durable bankruptcy law, again providing for open eligibility and the discharge of debts.[75]

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70. See Sandage, supra note 59, at 145, 189.

71. See id. at 208–16 (documenting resentment of white population that government had emancipated black slaves while failing to enact bankruptcy reform that might "free" white men from "debt slavery").

72. Cong. Globe, 38th Cong., 1st Sess. 2811 (1864).

73. Letter from George Cannon to Congressman Thomas A. Jenckes (Mar. 22, 1864), quoted in Sandage, supra note 59, at 208–09.

74. Obviously, this brief account of the connection between the slavery debates and bankruptcy reform highlights only one aspect of a complex history. For detailed accounts of the social, economic, and political forces that contributed to the decline of the debtors' prison and the rise of the bankruptcy discharge in the United States, see, e.g., Coleman, supra note 34, at 249–68 (describing the social, political, and practical pressures that contributed to the demise of the debtors' prison in the United States); Warren, supra note 68, at 52–79 (discussing the economic and political factors that led to enactment of the Bankruptcy Act of 1841).

75. Bankruptcy Act of 1867, ch. 176, §§ 11, 29, 14 Stat. 521, 531–32 (repealed 1878).

Compared to the 1841 Act, however, the Bankruptcy Act of 1867 regulated more closely the actual granting of a discharge. In addition to a requirement that a majority of creditors consent to the discharge (in cases where the debtor was paying a dividend of less than 50% on creditor claims),[76] the 1867 Act incorporated a particularly extensive list of grounds on which the discharge might be denied.[77] The debtor would be denied a discharge if, for example, he had transferred any property in contemplation of bankruptcy with the purpose of preferring one creditor to others, or if he had lost any of his property "in gaming."[78] Partly as a result of such restrictions, less than one-third of the debtors who applied for a discharge under the 1867 Act received it.[79]

The inclusion of elaborate conditions on the availability of the discharge continued, with various modifications, in subsequent bankruptcy enactments. For example, while the Bankruptcy Act of 1898[80] narrowed the grounds on which a debtor might be denied a discharge entirely,[81] it broadened the type of debts that might be excepted from the discharge granted to the debtor's other debts.[82] The debtor was denied a discharge of any debt based on certain kinds of fiduciary misconduct, fraud, or the infliction by the debtor of "willful and malicious injuries to the person or property of another."[83] The current bankruptcy law further elaborates on these restrictions.[84]

The inclusion of these restrictions on discharge defines a line of continuity from the debtors' prison to modern bankruptcy law. The violence deferred in the setting of the debtors' prison opened up a space of meaning, a place of the debtor's moral and spiritual inventory in which the point of imprisonment must be revealed over time. The bankruptcy system rejects the use of physical coercion as a method of debt collection, and replaces the holding of the debtor's body with an administrative process. At its core, however, the bankruptcy system retains the same performative response to the debtor's inability to pay. Bankruptcy law formalizes the process of moral judgment in the rules demanding financial disclosure and establishing conditions for the granting or denial of discharge. The essential nature of the performance that serves as a surrogate for the creditor's receiving the economic equivalent of his bargain remains the same: the revelation of character and an openness to the

76. Id. § 33, 14 Stat. at 533.

77. See id. § 29, 14 Stat. at 531–32.

78. Id.

79. Tabb, supra note 45, at 357–58.

80. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

81. As originally enacted, the 1898 Act included relatively few grounds on which discharge could be denied entirely, although the law was amended five years later to include additional grounds. Tabb, supra note 45, at 365–68 (reviewing legislative history of discharge provisions in the 1898 Act).

82. Id.

83. Bankruptcy Act of 1898 § 17a.

84. See 11 U.S.C. § 523 (2000).

possibility of grace. Modern law relocates the process of moral assessment to a new realm—and, in the form of a bankruptcy discharge, offers a more concrete form of redemption.

III. Modern Collection Law, Performance, and Ritual

A. *The Two Parts of Modern Collection Law*

The basic structure displayed in the law of the debtors' prison continues, with large differences in content, in modern collection law. Under modern law, this structure is formalized in the fundamental distinction between the two parts of collection law—nonbankruptcy (mostly state) collection law and federal bankruptcy law. Nonbankruptcy collection law seeks, wherever practicable, to provide an aggrieved creditor the economic equivalent of what he would have received if the debtor had not defaulted. It does so by creating a system that facilitates the creditor's forcible appropriation of the debtor's property. Meanwhile, bankruptcy law represents the space of meaning opened by violence deferred—a performative surrogate that stands in for the debtor's fulfillment of his original legal commitments.

In general, most collection disputes are settled under nonbankruptcy law, without any occasion or need to resort to bankruptcy law. Return, for example, to the debtor who has defaulted on a $10,000 obligation to Citibank. Assume that Citibank has recovered a judgment of that amount against the debtor. Nonbankruptcy collection law prescribes a procedure by which the creditor may satisfy the judgment. Pursuant to these rules, the creditor obtains another court order—called a writ—directing a sheriff to seize assets belonging to the debtor of a value sufficient to satisfy the obligation. The sheriff may seize tangible assets or, pursuant to another kind of writ, may garnish the debtor's right to receive property, including wages. These actions are subject to certain constraints, designed to protect the debtor from destitution or other undue harm.[85] The sheriff will ultimately arrange a public sale of any tangible property, with the proceeds of the sale turned over to the creditor to the extent of the obligation.[86]

Nonbankruptcy law also provides rules that govern priority if and when more than one creditor seeks to collect an unsatisfied obligation against the same asset of a common debtor. The general rule that governs the dispute between unsecured creditors is "first come, first served," with "first" being generally measured by the actual seizure of property on

85. For example, federal law generally limits the amount of wages that a creditor may garnish. 15 U.S.C. § 1673 (2000). In addition, state law exempts certain property, deemed essential to a debtor's life and livelihood, from involuntary seizure and process. See Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 27–30 (1989) [hereinafter Sullivan et al., Debtors] (describing workings of state exemption law).

86. For an overview of nonbankruptcy collection law, see Brian A. Blum, Bankruptcy and Debtor/Creditor: Examples and Explanations 35–61 (2d ed. 1999).

the creditor's behalf. This rule of priority—sometimes called "grab law"[87]—provides creditors with incentives to act quickly and resolutely upon a debtor's default.

This system of collection is entirely sufficient to handle most situations of default. A difficulty may arise, however, in the case where a debtor has defaulted to more than one creditor and there are not enough assets to go around. In that situation, under nonbankruptcy law, the only creditors who would be immediately paid would be creditors with a valid security interest in specific property of the debtor, and perhaps those unsecured creditors who happen to "grab" first.

Nonetheless, at least in principle, nonbankruptcy law is capable of handling that situation as well. Even an insolvent debtor may acquire income and other property in the future. If an unsecured creditor remains unpaid after the sale of the debtor's current assets, such a creditor may get paid from the debtor's future assets. Indeed, nonbankruptcy law authorizes unsecured creditors to stake a claim to the debtor's subsequently acquired property. For example, by recording a judgment on a public record, a creditor in most states may stake a prior claim to a debtor's subsequently acquired real property.[88] Perhaps more tellingly, by causing a writ of garnishment to be served on a debtor's employer, a creditor may commandeer a certain percentage of the debtor's income, as it is earned, for the purpose of satisfying his obligation.[89] Under nonbankruptcy law, a creditor's pursuit of the debtor thus may continue for years, until the creditor finally obtains the economic equivalent of what he was promised.

Although the nonbankruptcy system of creditor remedies can handle practically all disputes, its sole reign would come at a cost. For one thing, the strict enforcement of these remedies would threaten the stability of middle-class lifestyles. The seizure of the debtor's current assets—especially the debtor's home or car—inflicts suffering upon the debtor and her family, and disrupts the organization of the debtor's life. Meanwhile, by extending the creditor's ability to collect into the indefinite future, a collection law consisting exclusively of nonbankruptcy remedies would rob middle-class debtors of their ideological birthright—the promise of self-improvement through hard work. The legal order thus confronts a place of normative impasse: The forcible vindication of the middle-class virtue of fulfilling one's commitments threatens to undermine other middle-class ideals, and potentially the middle class itself.

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87. See, e.g., Jackson, supra note 19, at 9 (describing collection procedures under nonbankruptcy law).

88. Elizabeth Warren & Jay Lawrence Westbrook, The Law of Debtors and Creditors: Text, Cases, and Problems 49–50 (2001) (describing effect of recordation of judgments).

89. See id. at 81–82 (detailing mechanics of garnishment action). State and federal law strictly limit the percentage of the debtor's earnings subject to garnishment. See id. at 86–88.

B. *Bankruptcy Law as a Rite of Passage*

"[P]erformance is always a doing and a thing done."[90] As rites of passage remind us, performance is also an "undoing": Not only does the boy become a man, the making of the man "undoes" the boy. Bankruptcy law, like a rite of passage, is a doing that performs an "undoing": The (worthy) debtor, submitting to the bankruptcy process, undoes his commitments to his creditors and obtains a discharge of his debts. The accomplishment of this end is not simple. It requires the social order's "doubling back" on foundational norms and categories. Just as the socially sanctioned initiation must undo the force of categories that the social order itself has defined, so bankruptcy law must undo commitments that the law itself has created. The challenge, shared by conventional rites of passage and bankruptcy law alike, is to undo those categories or commitments in a way that affirms and reinscribes—rather than undermines—the norms and values on which those categories or commitments are based. Thus, the process must undo a social state without undoing a social order.

In his influential analysis of ritual's structure, Arnold van Gennep identifies the three phases by which the archetypal rite of passage achieves its end.[91] The first phase effects a *separation* of the subject from secular space and time, and often is accompanied by symbolic enactments of reversal or inversion that distance the subject from his previous state.[92] In the second phase, the ritual subject enters into *transition,* a social limbo in which normal social categories—of life and death, female and male, human and animal—are blurred and sometimes entirely effaced.[93] This stage is often accompanied by increased reflexivity—in Victor Turner's words, "the ways in which a group tries to scrutinize, portray, understand, and then act on itself."[94] Finally, in the third phase of *reincorporation,* the ritual subject comes to occupy a new social status, welcomed back into society with symbolic representations that signify the assuming of new privileges and responsibilities.[95] Through these three

90. Elin Diamond, Introduction, *in* Performance and Cultural Politics, supra note 15, at 1, 1.

91. Arnold van Gennep, The Rites of Passage 10–11 (1960). For analyses of van Gennep's theories of ritual, see, e.g., Bell, supra note 14, at 35–38; Victor Turner, From Ritual to Theatre 24–27 (1982).

92. See van Gennep, supra note 91, at 130–31 (detailing various rites of separation connected to marriage); see also Turner, supra note 91, at 24 (indicating that the phase of separation "demarcates sacred space and time from profane or secular space and time").

93. See van Gennep, supra note 91, at 135–39 (describing transitional rites connected with marriage); see also Bell, supra note 14, at 36 (describing transitional phase as constituting a "suspended 'betwixt-and-between' state"); Turner, supra note 91, at 24 (characterizing transitional phase as "a period and area of ambiguity, a sort of social limbo").

94. Turner, supra note 91, at 75.

95. See van Gennep, supra note 91, at 131–33 (describing individual and collective rites of incorporation connected to marriage); see also Bell, supra note 14, at 36 (describing reincorporation as involving symbolic acts that "focus on welcoming the

phases, the rite of passage effects a change in social status—the undoing of fundamental social categories—without subverting the overall normative order.[96]

The "rite of passage" that is modern bankruptcy law evinces a similar structure. Somehow the law must move the debtor and her creditors from one state to another: the debtor, from a state of default to a fresh start; the debtor's creditors, from a state of having unpaid debts to one in which debts have been satisfied, whether or not they have been fully paid. The process begins with the filing of a bankruptcy petition, and the separation of the debtor and her creditors from their customary places and occasions for conducting business. The bankruptcy process itself involves a kind of commercial limbo—a context of heightened reflexivity in which, as will be detailed later,[97] fundamental norms of commercial behavior are inverted and categories blurred. Finally, the process culminates in reincorporation: the inevitable return of debtors and creditors—albeit transformed—to a commercial world governed by the usual social norms and categories.

In order to insulate the prevailing social order from disturbance, rites of passage must secure the boundary between the ritual world of normative inversion and the literal world of normative stability. In other words, people must understand the event as ritual, not "real-life." Erving Goffman refers to this kind of interpretative framing as "keying"—namely, "a systematic transformation . . . across materials already meaningful in accordance with a schema of interpretation," which "utterly changes what it is a participant would say was going on."[98] Keying thus involves a "rewriting" of existent materials that fundamentally affects how observers organize their experience of those materials. To take a common example, a dramatic reenactment of an event is a keying of the actual event. Although most of Goffman's examples of keying involve the transcription of "real-life" behavior into some form of make-believe, simulated, or "non-serious" behavior,[99] there is no reason why keying may not incorporate other forms of transformation.

Bankruptcy law is a keying of nonbankruptcy law. Bankruptcy law takes nonbankruptcy law as its baseline—all parties enter the bankruptcy context defined by their rights and obligations under nonbankruptcy law—and then "rewrites" that law in a way that accounts for the exigen-

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person into a new status"); Turner, supra note 91, at 24–25 (indicating that reincorporation "includes symbolic phenomena and actions which represent the return of the subjects to their new, relatively stable, well-defined position in the total society").

96. See, e.g., Bell, supra note 14, at 37 (indicating, in connection with van Gennep's views, that "[r]ituals are the means for changing and reconstituting groups in an orderly and sanctioned manner that maintains the integrity of the system").

97. See infra note 127 and accompanying text.

98. Erving Goffman, Frame Analysis: An Essay on the Organization of Experience 45 (1974).

99. See id. at 47–81 (discussing the major types of keys, including "make-believe, contests, ceremonials, technical redoings, and regroundings").

cies of financial distress. Bankruptcy law thus represents a systematic transcription across the materials of nonbankruptcy law, which is openly acknowledged as such by its participants, in a way that "utterly changes what it is a participant would say was going on."

To signal the boundary between the transformed and original materials, keying uses brackets in time and space.[100] The bankruptcy system actively employs such bracketing, and thereby effects a kind of ritualistic separation of the debtor and her creditors from the world of conventional norms. To initiate a bankruptcy case, someone (most commonly the debtor) must file a petition.[101] This formal act immediately creates a new space for resolving the disputes that surround the debtor's financial distress: It centralizes the handling of all litigation in a single federal court (removed from the various state courts that otherwise might have jurisdiction),[102] governed by a distinct federal law. The filing of the petition also introduces an altered sense of time. Immediately upon the filing, there arises an "automatic stay," which forbids any creditor from taking any unilateral action to collect prepetition debt.[103] At the same time, the federal statute (and the court) imposes its own schedule for dealing with the debtor's financial affairs. Creditors must file claims within deadlines,[104] and must submit any disputes to the centralized court—again within bankruptcy law's own schedule.[105]

Even more profoundly, the filing of the bankruptcy petition defines a divide between past and future—between the debtor's prepetition life and his postpetition redemption—that is crucial to the structure and meaning of the bankruptcy process. Just as a person's death creates an "estate," the "death" of the debtor's financial life gives rise to a new legal

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100. See id. at 45.

101. See 11 U.S.C. § 301 (2000) (providing for the commencement of a voluntary bankruptcy case by the debtor's filing of a bankruptcy case). The Bankruptcy Code also provides for "involuntary" bankruptcy cases initiated by creditors. See id. § 303(b) (authorizing the filing of involuntary Chapter 11 or Chapter 7 cases). Involuntary cases, however, only account for a small percent of bankruptcy cases filed. See Warren & Westbrook, supra note 88, at 476 (characterizing the incidence of involuntary petitions as "rare").

102. The federal district court has "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under" the Bankruptcy Code. See 28 U.S.C. § 1334(a)–(b) (2000). Pursuant to standing orders issued in each jurisdiction, however, district courts generally refer all bankruptcy cases and proceedings to bankruptcy judges for the district. See 28 U.S.C. § 157(a)–(c) (permitting district courts to refer cases and proceedings arising under the Bankruptcy Code to bankruptcy judges, and authorizing bankruptcy judges to hear cases and proceedings under this law).

103. 11 U.S.C. § 362(a).

104. See Fed. R. Bankr. P. 3002(c) (establishing deadlines for filing claims in consumer bankruptcy cases).

105. See, e.g., Fed. R. Bankr. P. 3015 (b), (f) (requiring that Chapter 13 debtor's plan be filed within fifteen days after the filing of the petition, and that any objection to the plan be filed before the plan's confirmation); Fed. R. Bankr. P. 4004(a) (establishing deadlines for filing of complaints to debtor's discharge).

entity called a bankruptcy "estate."[106] Generally described, the estate includes all property belonging to the debtor at the time of the filing of the petition.[107] In the context of bankruptcy liquidation, the estate represents the debtor's material past. Meanwhile, all property acquired by the debtor after the filing of the petition—including her earnings after the date of the bankruptcy—belongs to the debtor's new life; it is part of her "fresh start."[108]

This process, which begins with the filing of the petition, culminates in the closing of the bankruptcy case. The creditors receive the distributions to which they are entitled,[109] and the debtor obtains (or is denied) a discharge of her remaining prepetition obligations.[110] The bankruptcy process thus represents an extended "present tense" removed from the ordinary spaces in which debtors and creditors generally conduct business and resolve disputes. With this bracketing of space and time, participants may be more inclined to accept deviations from prevailing norms. The law can jeopardize those norms within this special context without threatening the force of these norms outside this context.

The creation of this separate normative realm is, however, more problematic in this situation than in more common instances of keying. After all, an audience of a play generally is not threatened by the "systematic transformation" of real-life materials that the drama involves. A play is just a play. In contrast, bankruptcy law's keying of nonbankruptcy law alters what purport to be legally vested rights and remedies. Bankruptcy law's permanent transformation of nonbankruptcy rights and remedies—

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106. See 11 U.S.C. § 323(a) (designating trustee as the "representative of the estate").

107. See id. § 541(a) (defining "property of the estate"). In a Chapter 13 individual reorganization case, property of the estate also includes income earned by the debtor during the pendency of the case. See id. § 1306(a)(2) (defining "property of the estate" in a Chapter 13 context to include not only the debtor's prepetition property, but also "earnings from services performed" while the case is pending).

108. See id. § 541(a)(6) (excepting postpetition earnings from property of the estate). The Chapter 13 debtor receives a different kind of "fresh start." Unlike a Chapter 7 debtor, a debtor in Chapter 13 generally retains possession of her prepetition property. See id. § 1306(b) (indicating that "the debtor shall remain in possession of all property of the estate"); id. § 1327(b) (providing that, except as provided in the plan, a Chapter 13 confirmation causes all property of the estate to vest in the debtor). In addition, a Chapter 13 debtor enjoys special statutory protections by which, in many cases, she may prevent a secured creditor from foreclosing on her encumbered prepetition property. See id. § 1322(b)(3) (authorizing the "curing or waiving of any default" under a Chapter 13 plan); id. § 1322(b)(5) (providing, as to certain kinds of debt, curing of any default and "maintenance of payments" in accordance with original contract). At the same time, however, the Chapter 13 debtor must devote a portion of future earnings to payments under her plan. See id. § 1322(a)(1) (requiring that a Chapter 13 plan provide for the debtor's submission of future earnings).

109. See id. § 726 (providing for distribution of the estate's property in a Chapter 7 case); id. § 1326(a)(1) requiring the debtor to commence making payments under a Chapter 13 plan within 30 days after the plan's filing).

110. See id. § 727(a) (regulating court's grant of Chapter 7 debtor's discharge); id. § 1328(a) (regulating court's grant of the debtor's discharge in Chapter 13 cases).

albeit confined to a special place and time—may seem to undermine the law itself. As a result, bankruptcy law faces a special challenge: It must rewrite nonbankruptcy rights and remedies in a way that does not subvert nonbankruptcy law's underlying norms and values.

As a first step toward meeting this challenge, bankruptcy law provides for a legal structure and discourse that recognize the primary importance of legal commitments and nonbankruptcy rights and remedies. Parties enter the bankruptcy context with rights and obligations defined, in the first instance, by nonbankruptcy law.[111] Furthermore, courts use a conceptual framework that privileges the sanctity of property interests. The Supreme Court's language in *Butner v. United States* is typical: "Unless some federal [bankruptcy] interest requires a different result, there is no reason why [state law property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[112] By giving special weight to the sanctity of nonbankruptcy property interests, the Court displays a continuing connection to the fundamental norms that surround the making of legal commitments.

In many important ways, however, bankruptcy law violates norms of promise keeping and deviates from nonbankruptcy rights and remedies. Current bankruptcy law offers two basic means to discharge debts without making full payment, and generally permits debtors to choose the form of bankruptcy that offers them the best chance of continuing their way of life with the least disruption.[113] A Chapter 7 bankruptcy case or "liquidation" requires that the debtor surrender most of his assets, but in return grants the debtor a discharge that immunizes his future income from the collection efforts of his prepetition creditors. In contrast, a Chapter 13 bankruptcy case or "individual reorganization" requires that the debtor agree to pay a percentage of his prepetition debts over time, but permits the debtor to retain his current assets. In either case, the bankruptcy process prevents unsecured creditors from pursuing their remedies under nonbankruptcy law, pays them dividends that are generally a small fraction of their claims, and then discharges the remaining debt. In the face of these clear deviations from nonbankruptcy law, bankruptcy law must somehow accomplish two seemingly incompatible things at once—take definite actions that depart from nonbankruptcy norms, yet somehow demonstrate continuing regard for those norms.

Bankruptcy law's struggle to manage a normative "departure" without normative "offense" resembles the problem that people face, in their everyday interactions, when they take leave of each other. A farewell

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111. See, e.g., id. § 101(5) (defining "claim" in terms of having a "right to payment" under nonbankruptcy law); id. § 541(a) (defining "property of the estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case").

112. Butner v. United States, 440 U.S. 48, 55 (1979).

113. But see 11 U.S.C. § 109(e) (establishing eligibility requirements for Chapter 13 filing); id. § 707(b) (authorizing court to dismiss Chapter 7 case that represents a "substantial abuse" of the Bankruptcy Code).

marks a potentially disruptive event, a change in status—from presence to absence.[114] In Goffman's terms, abrupt departure threatens the loss of "face."[115] In one-to-one social interactions, each person projects a self-image to the other. A person maintains face when his projected self-image is consistent with his behavior, and loses face when he behaves in a way that cannot be made consistent with this projected self-image.[116] Not only does each individual seek to save his own face; participants in social interchange generally also embrace an unspoken agreement to help maintain each other's face.[117] By engaging in "face-work," they seek to "counteract 'incidents'—that is, events whose effective symbolic implications threaten face."[118]

Being in the company of someone is a kind of commitment; leave-taking is a potential breach. The challenge for leave-takers is to "undo" the commitment of presence in a way that continues to show respect and regard for the other person. "One's face, then, is a sacred thing, and the expressive order required to sustain it is therefore a ritual one."[119] This is accomplished through the employment of the everyday ritual of leave-taking. "Ritual is a perfunctory, conventionalized act through which an individual portrays his respect and regard for some object of ultimate value to that object of ultimate value or to its stand-in."[120] A farewell is a kind of ritualized apology. By exchanging goodbyes, each person reassures the other that the accompanying departure is not intended as a negative judgment or slight.[121]

The ritual of leave-taking operates reflexively—"doubling back" on norms that may require fulfillment of the "commitment" of continuing presence. It works by providing an implicit comment on the meaning of the departure. This commentary seeks to counteract what might be the

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114. See Erving Goffman, Relations in Public: Microstudies of the Public Order 79 (1971) [hereinafter Goffman, Relations in Public] (indicating that rituals of greeting and farewell are "access rituals" that "mark a change in degree of access").

115. See Erving Goffman, Interaction Ritual: Essays in Face-to-Face Behavior 8–9 (1967) (defining loss of face).

116. See id.

117. See id. at 11.

118. Id. at 12.

119. Id. at 19.

120. Goffman, Relations in Public, supra note 114, at 62.

121. In his analysis of rituals of interchange, Goffman distinguishes between supportive rituals and remedial rituals. See id. at 63–64, 158. While supportive rituals generally maintain or support social connectedness, remedial rituals respond to actual or threatened infractions by changing "the meaning that otherwise might be given to an act, transforming what could be seen as offensive into what can be seen as acceptable." Id. at 109. Goffman formally categorizes greetings and farewells as supportive rituals, see id. at 79, while also acknowledging that greetings (and, by logical extension, farewells) may be viewed as "a correction, a remedy, for what otherwise would become an offense." Id. at 158.

worst possible interpretation of the departure.[122] In a sense, the leave-taker "splits off" into two parts, the person actually making the departure and the person commenting on the departure and thereby demonstrating a proper regard for the other person.[123] A leave-taker thus breaks off his continuing presence while at the same time assuring the other person that the departure does not breach some deeper, more fundamental connection.

Like a person's "face," the norms of promise keeping and respect for property rights represent objects "of ultimate value" in capitalist society, and the expressive order required to sustain such norms is a ritualistic one. Collection law attempts to control and manage the potential disruption of undoing legal commitments by "splitting off" from itself—altering nonbankruptcy rights and remedies while distancing itself from its own actions. In addition, like in the situation of leave-taking, bankruptcy law seeks to realize this distance through an ongoing commentary that counteracts the worst interpretation of what it does. This reflexive commentary—which takes the form of rituals of leave-taking in the sphere of face-to-face departures—takes equally ritualistic forms in the bankruptcy context.

To manage its constant departures from nonbankruptcy law, bankruptcy law relies primarily on rituals of deliberative rationality—the embodied practices of decisionmaking based on the weighing of reasons.[124]

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122. See id. at 108–09 (indicating that remedial works seek to counter "one or more 'worst possible readings,' that is, interpretations of the act that maximize either its offensiveness to others or its defaming implications for the actor himself").

123. See id. at 113 (describing an apology as "a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule"). The ritual of leave-taking also may be accompanied by what Goffman calls "body gloss"—"a bodily enactment of [a person's] alignment to the events at hand." Id. at 11, 125. In one of Goffman's examples, a woman seeks to extract herself from a conversation with a few of her neighbors in order, as they know, not to miss a TV show. As she gets clear of her circle of friends, she makes a self-deprecating laugh and performs a mock jog for a brief time and then reassumes her normal walk. See id. at 135 n.29. Through her laugh and "over-run," the woman effectively comments on her own behavior—distancing herself from the person who actually leaves and thereby demonstrating proper regard for her neighbors. In Goffman's words, the body gloss serves as "a means by which the individual can try to free [herself] from what otherwise would be the undesirable characterological implications of what it is [she] finds [herself] doing." Id. at 129. In the process, she undoes the "commitment" of her presence in a way that defers to fundamental norms of neighborliness—and thereby saves her own face and that of her neighbors. See also Dean MacCannell, Empty Meeting Grounds: The Tourist Papers 266–69 (1992) (analyzing this example to demonstrate the political content of ritual).

124. This concept of deliberative rationality derives, in the first instance, from Rawls's theory of what constitutes the "good" for persons. See John Rawls, A Theory of Justice 416–17 (1971). According to Rawls, a rational life plan for a person is one that emerges from the exercise of deliberative rationality—"as the outcome of careful reflection in which the agent review[s], in the light of all the relevant facts, what it would be like to carry out these plans and thereby ascertain[s] the course of action that would best realize his more fundamental desires." Id. at 417. As applied to social (as opposed to personal)

"Unless some federal [bankruptcy] interest requires a different result," as the Court in *Butner* noted,[125] there is no reason to alter the nonbankruptcy entitlements. If there is some compelling bankruptcy interest, however, then nonbankruptcy entitlements must give way. The giving of a compelling reason to deviate from nonbankruptcy rights and remedies justifies the deviation—not only logically, but also symbolically. The alteration of nonbankruptcy rights and remedies, when accompanied by a compelling reason, does not signify a willful disregard for the sanctity of property interests. Instead, the change apparently arises from necessity—it is "required" by some bankruptcy interest. The giving of a compelling reason for a change in nonbankruptcy rights and remedies thus seeks to address the worst interpretation of such a change. It is not only a means of seeking a rationally justified outcome; it is a way of showing respect and regard for persons who may be adversely affected by departing from nonbankruptcy law—and for the norms that might be violated by such departure.

The exercise of deliberative rationality enacts a "stepping back," a temporary separation from the exigencies and disorder of the immediate crisis. On the level of personal choice (outside the bankruptcy sphere), the ideal of deliberative rationality suggests that a person faced with a decisionmaking crisis may achieve an enlightened perspective by removing herself from the immediate exigencies of the crisis.[126] In the bankruptcy context, the ideal of deliberative rationality suggests that the legislature and the courts are capable of stepping back from the problem of financial distress and of instituting laws that are rationally adjusted to its special dimensions. Bankruptcy decisionmaking thus performs the role of supplying the reflective and deliberative capacity that those persons affected by the household's financial distress currently lack. This "stepping back" affords a normative perspective that is supposedly superior to the one it supplants.

The "stepping back" performed by bankruptcy jurisprudence gives rise to an implicit commentary on nonbankruptcy law, together with a set

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choice, deliberative rationality suggests an ideal process in which decisions are made only after full consideration of the relevant reasons for and against a proposed course of action. See, e.g., Robert Justin Lipkin, Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures, 29 U. Rich. L. Rev. 1263, 1277 (1995) (stating that "deliberative rationality is committed to giving reasons for and against various judgments counseling the inquirer to embrace the judgment having the best reasons—where best is understood in terms of comprehensiveness, depth, and coherence, as well as the judgment's role in the process of inquiry and persuasion"); Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2193 (1990) (indicating that decisionmaking institutions should promote deliberative rationality, in the sense that they should "promote the activity of reason-giving and create contexts in which reason-giving can have a decisive influence over the actual choices made").

125. See supra note 112 and accompanying text.

126. See Rawls, supra note 124, at 417.

of normative objectives that invert nonbankruptcy norms and practices. It defines a kind of liminal space, in which the ordinary rules and understandings that govern commercial practices are temporarily suspended. In place of the normative dictates that promises must be kept and property interests preserved, bankruptcy law requires that the "honest but unfortunate debtor" be provided forgiveness of prepetition debts and a fresh start.[127] In place of nonbankruptcy "grab law" that rewards the most aggressive creditor, bankruptcy law seeks to provide "equality of distribution" among similarly situated creditors.[128] In this world of reversals, debtors are rewarded by a decision *not* to honor their original agreements, while creditors suffer discharge of their debts, often receiving nothing (or very little) in return. Ironically, then, the very means by which the law struggles to show ritualistic respect and regard for nonbankruptcy norms—the reason-giving of deliberative rationality—also provides the basis for inversion of these norms.

The use of deliberative rationality is not the only means by which bankruptcy law ritualistically "excuses itself," demonstrating the necessity of its departures from nonbankruptcy law. Bankruptcy law also compels the debtor to act in ways that symbolically show the necessity of the relief that he seeks. Just as the ritual of leave-taking softens the potential offense of an ongoing departure, the debtor's compelled performances qualify the potential offense of broken promises.

By filing a petition that initiates a bankruptcy case, the debtor effectively surrenders his will to the bankruptcy process. The petition includes the debtor's public "confession"—the complete and accurate disclosure of his financial affairs. In order to receive relief, the debtor must then take formal steps that testify to his subjection, either surrendering his assets to the estate or, alternatively, agreeing to devote all his disposable income to repaying his creditors. The significance of these actions is not only economic—indeed, most debtors have little or no assets to surrender,[129] or propose low percentage repayment plans[130]—it is also symbolic. Through these actions, the debtor publicly stages his own powerlessness to change circumstances; he displays that his seeking to avoid his debts cannot be a moral choice, for he lacks the agency to choose. At the same time, in order to prove worthy of forgiveness, the debtor must submit himself to the moral inventory embodied in the rules governing the granting or denial of discharge.[131] By these various forms

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127. See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

128. See Nathanson v. NLRB, 344 U.S. 25, 29 (1952) (quoting Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941)).

129. See Sullivan et al., Debtors, supra note 85, at 205 (concluding that most debtors have very few saleable assets at the time of filing).

130. See, e.g., Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 Am. Bankr. L.J. 501, 532 (1993) (reporting routine approval of low percentage Chapter 13 plans in certain jurisdictions).

131. See 11 U.S.C. § 523 (2000) (defining nondischargeable debts); id. § 727(a) (establishing grounds for denial of Chapter 7 discharge); id. § 1328(a) (establishing

of surrender and submission, the debtor struggles to separate himself from the characterological implications of his bankruptcy filing, and thereby qualifies the meaning of the social breach that he is concurrently committing.

Bankruptcy law's varied performances—from its embodied exercise of deliberative rationality to the debtor's formal subjection—are ways by which the law struggles to control the interpretation of its potentially subversive impact. To many observers, however, bankruptcy law's performative showing of continuing regard for nonbankruptcy law's underlying norms is not convincing. According to its critics, bankruptcy law robs creditors of their contractual and property interests, and serves as a haven for irresponsible spenders and manipulative abusers of the legal process.[132]

These criticisms have become particularly strong as the number of consumer bankruptcies has continued to rise. Currently before Congress, for example, is a bill that replaces the relatively open availability of Chapter 7 relief with a "means test" that denies Chapter 7 relief to those debtors who can pay a specified percentage of their debts under a Chapter 13 plan.[133] Proponents of the bill assert that bankruptcy law is not a free ride, that debtors who "can pay" should be forced to pay.[134] Opponents of the bill counter that the instances of abuse under current law are rare, and that retaining relatively open access to Chapter 7 relief (while not perfect) is the best available means of assuring that those persons

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grounds for denial of Chapter 13 discharge). In certain instances, the Chapter 7 debtor may also be called upon to demonstrate that the filing of the petition is not a "substantial abuse" of the Bankruptcy Code. See id. § 707(b) (authorizing the court, on its own motion or that of the United States Trustee, to dismiss certain Chapter 7 cases on the ground of substantial abuse).

132. See, e.g., A. Mechele Dickerson, Bankruptcy Reform: Does the End Justify the Means?, 75 Am. Bankr. L.J. 243, 262–63 (2001) (reviewing recent criticisms that bankruptcy law encourages opportunistic behavior and allows debtors to break promises without stigma); David A. Moss & Gibbs A. Johnson, The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?, 73 Am. Bankr. L.J. 311, 314–18, 320–22 (1999) (tracing criticisms of bankruptcy law from 1898 to the present, and arguing that "critics have been blaming growth in consumer bankruptcies on the supposed breakdown of social stigma . . . for well over eighty years").

133. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. §§ 101–102 (2003). The bill, which the House passed on March 19, 2003, is almost identical to last session's bankruptcy bill, H.R. 333, a version of which was nearly approved by the Congress as a whole. See S. 420, 107th Cong. (2001); H.R. 333, 107th Cong. (2001); see also Legislation Thrown for Loss; Hail Mary Pass Fails at End of 107th, Am. Bankr. Inst. J., Dec.–Jan. 2003, at 3 (reporting the "surprising defeat" of H.R. 333 on the last day of the lame-duck session of the 107th Congress).

134. See, e.g., Edith H. Jones & Todd J. Zywicki, It's Time for Means-Testing, 1999 BYU L. Rev. 177, 181, 186–92 (defending means-testing "based on the simple proposition, generally accepted in American society, that people should pay their debts if able," and defending studies that support means-testing).

who need relief will get it.[135] Now as always, bankruptcy jurisprudence evolves as a debate about the appropriate symbolic terms on which bankruptcy law performs its continuing connection to the norms and values that it must leave behind.

IV. Bankruptcy Law and the Survival of Middle-Class Ideology

By means of surrogation, current bankruptcy law seeks to cope with the irreparable loss constituted by the debtor's financial distress, offering an administrative process that, however imperfectly, stands in for the debtor's fulfillment of her original obligations. In this aspect, the law's surrogation seeks to compensate for a loss that is intrinsic to legal process—a breach in some legal obligation. At the same time, however, bankruptcy law works to compensate for perceived losses in the wider political, social, and economic spheres. Financial distress is a potentially destabilizing force, which may challenge existing social status and hierarchy. As part of the means by which culture survives and reproduces itself, bankruptcy law struggles to repair the socioeconomic and moral ruptures that accompany financial failure.

A. *The Bankruptcy Discharge's Insulation of the Middle Class*

For as long as there have been debtors and creditors, financial distress has represented a borderland—a crossing between zones of socioeconomic status and privilege. The bankruptcy system has policed this boundary between the cultural mainstream and the margin. As it first developed in England, the bankruptcy discharge was available only to traders. The relief offered by the discharge thus supported the political and economic power of an expanding mercantile class. In addition, it upheld quasi-religious doctrine that equated debt with sin; it "performed" moral and religious virtue in the face of challenges created by the increasing commercialization of society.[136] With the American Revolution and the struggles over black slavery, the performative role of the bankruptcy discharge shifted. Now available (at least potentially) to all those who filed, the bankruptcy discharge represented a surrogate for the white society's threatened status and privilege—reinscribing the moral and eco-

135. See, e.g., Sullivan et al., Debtors, supra note 85, at 220 (concluding, based on the insignificant number of "can-pay" debtors, that "the effort to keep can-pay debtors out of bankruptcy or force them into Chapter 13 is a wasteful misdirection of energy"); Marianne B. Culhane & Michaela M. White, Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors, 7 Am. Bankr. Inst. L. Rev. 27, 31 (1999) (reporting that only 3.6% of debtors would be categorized as "can-pay" debtors and thus disqualified for Chapter 7 relief under means-testing bill before Congress); Elizabeth Warren, The Bankruptcy Crisis, 73 Ind. L.J. 1079, 1085–1100 (1998) (criticizing studies that report widespread bankruptcy abuse).

136. See supra notes 53–55 and accompanying text.

nomic distinction between "enterprising" white men and their black counterparts.[137]

With the development of modern bankruptcy law and the concurrent rise of the consumer society and the American middle class, the bankruptcy discharge has a different role: It represents a performative response to fundamental contradictions and tensions in middle-class ideology. Americans generally believe in economic self-determination—that financial failure is an (avoidable) accident, and that if you work hard enough, you will succeed.[138] According to that same ideology, however, success generally means a lifestyle subsidized by credit purchases that tend to place the lifestyle increasingly at risk.[139] Meanwhile, a competitive market economy virtually guarantees the existence of significant job loss and erosion,[140] while the existing system of unemployment compensation and medical coverage leaves even temporarily unemployed persons vulnerable to financial distress.[141] As the result of these combined factors, the existence of financial failure among the middle class is not an aberration; it is a structural component of the current economic and legal system.

In this context, the bankruptcy discharge polices the boundary between the middle class and the long-term poor. Without a bankruptcy system, the economic reality is that many financially distressed individuals would be impoverished. By preventing thousands of middle-class Americans from experiencing poverty, the bankruptcy discharge increases the distance between the American mainstream and its margin. The distance created is not only economic; it is also political. The existence of the discharge keeps many relatively powerful persons—with educations and in occupations typical of the middle class—from joining the political constituency of the poor. In this way, the availability of a bankruptcy discharge indirectly contributes to the current political situation, in which the day-to-day concerns of the middle class often receive more attention than basic needs of the long-term poor.

By thus policing the boundary between the mainstream and the margin, the bankruptcy discharge offers a surrogate for what middle-class ideology perpetually promises but can never deliver—namely, secure middle-class status and, even more fundamentally, a stable source of American self-identity. Not only are we (the American people) mostly middle-class, but it is the middle class—its struggles, values, and tri-

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137. See supra notes 59–73 and accompanying text.

138. See, e.g., Newman, supra note 3, at 8 (suggesting that Americans "have cultivated a national faith in progress and achievement" which "stands in the way of recognizing how frequently economic failure occurs").

139. See supra notes 3–4 and accompanying text.

140. See Sullivan et al., Middle Class, supra note 3, at 106–07 (stating that an increasingly market-driven economy leads to higher job insecurity in the middle class).

141. See id. at 88, 259 (noting gaps in unemployment coverage for part-time workers and workers in certain industries).

umphs—that most identifies "us" as American. Like the middle class, we as a people play by the rules; we are hard working, experimental, and constantly improving ourselves; resilient in defeat and ultimately triumphant. The reality of financial failure and long-term poverty—embodied in the continuing existence of a significant economic underclass—threatens this self-identification, and must be contained.

The bankruptcy system creates an insulated space, metaphorically removed from the sites in which the long-term poor struggle to get by. In this special space, middle-class people encounter themselves, reflected in the familiar mirror of middle-class standards and excuses. Those who have "cheated"—who have not lived according to the relevant standards of personal responsibility and fair dealing—do not belong among "us." In most cases, however, bankruptcy debtors encounter financial distress for reasons that all of us may face—job loss or disruption, divorce, medical costs, credit card bills, the high costs of supporting a family. On this stage, people display the virtues and challenges of the middle-class way of living. They may have lost this round of the market's competition, but they are not "losers." While bankruptcy law considers financial failure as raising issues of personal responsibility, it ultimately provides forgiveness to the overwhelming majority of debtors who apply. In this world, the middle class remains middle-class; and failure remains a temporary misstep, an accident in a world where success remains the norm.

B. *Bankruptcy Law and Middle-Class Redemption*

> You said . . . that they had to wait and save their money before they even thought of a decent home. Wait? Wait for what? Until their children grow up and leave them, until they're so old and broken down that—do you know how long it takes a working man to save $5,000? Just remember this, Mr. Potter, that this rabble you're talking about, they do most of the working and paying and living and dying in this community. Well, is it too much to have them work and pay and live and die in a couple of decent rooms and a bath?
>
> —George Bailey, in the film *It's a Wonderful Life*[142]

George Bailey—an eloquent spokesperson for the credit lifestyle—does not share its values. In Frank Capra's film, George desperately yearns to escape from his middle-class existence in Bedford Falls, and dreams of an unconventional life as an explorer. Trapped by circumstances and his own conscience, he takes over his father's job at the Savings and Loan, gets married, has kids, and pays the bills. All the while, he views himself—and his middle-class life—as a failure.

By the film's end, George is transformed. Rather than continuing in the role of spoiler and critic, George becomes the medium by which the middle class affirms its deepest values in the face of challenges. The

142. It's a Wonderful Life (Liberty Films 1946).

agency of George's transformation is the angel Clarence. At the brink of suicide, George receives a "gift"—the chance to see what the world would be like without him. Through this privileged vision, he comes to appreciate, in the deepest sense, the trappings of middle-class life—the job, the wife, the kids, the house, and his friends. He sees the spiritual in the mundane and, like Scrooge before him, finds that "everything could yield him pleasure."[143] The film thus traces the passage from loss to affirmation, from doubting middle-class values and lifestyle to celebrating their riches.

Considered more broadly, *It's a Wonderful Life* is a parable about how the capitalist system copes with the ideological threat of doubt and failure—and as such it is also the story of bankruptcy law. The middle-class debtor in financial collapse—like George Bailey in despair—casts doubt on the tenets of an ideology that promises fulfillment through disciplined effort. One social response to such a crisis seeks to extract the debtor from his bind without offending prevailing ideology. Thus, as this Essay has shown, the current bankruptcy system seeks to undo the debtor's legal commitments in a way that does not undermine fundamental legal norms.

George's transformation—and the triumph of middle-class life that the film displays—suggests a complementary strategy. It involves not merely defending ideology against transgression, but somehow transforming the occasion of transgression into an occasion of a deeper affirmation. This second approach requires a liminal experience, like George's counterfactual vision. The bankruptcy process embodies such a perspective. It represents a space of inverted norms and redemptive possibilities, metaphorically removed from other sites of financial collapse and impoverishment. A debtor surrendering to the process emerges cleansed of prepetition sins and ready to encounter anew the struggles and triumphs of middle-class existence. The debtor's rebirth seems to vindicate faith in the capitalist system, transforming an occasion of financial loss and broken commitments into an occasion of affirming the middle-class lifestyle despite its inherent risk.

George Bailey undergoes a miraculous journey, only to be returned to the confines of his middle-class life. What George gains is not a new reality, but instead a new appreciation—a new connection to the mundane realities of his everyday life. Similarly, the bankruptcy process serves primarily as a means of reinscribing current ideologies. In the process, however, the existence of the bankruptcy system utterly changes the cultural meaning of the financial distress of the middle class. Rather than representing a point of impasse, financial distress offers a passageway, one that reconnects middle-class debtors to America's fundamental values and core myths.

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143. Charles Dickens, A Christmas Carol, *in* Christmas Books 1, 95 (Heron Books 1970) (1843).